Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-252

FEDERAL REALTY ESTATES COMPANY,

Petitioner,

vs.

CITY OF CHICAGO, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether the decision below conflicts in principle with the decisions of other federal courts as to what constitutes the taking of property in violation of Fifth and Fourteenth Amendment rights.

2) Whether the decision below conflicts in principle with the decision of this Court as to the application of due process to protection of property interests.

STATEMENT OF THE CASE

The petitioner seeks review of the Seventh Circuit's affirmance of an order granting the motion of the respondents, the City of Chicago, Joseph Fitzgerald. its building commissioner, and Richard L. Curry, Corporation Counsel, to dismiss petitioner's complaint for failure to state a cause of action.

Petitioner, an Illinois Corporation, had filed a three-count complaint against respondents for damages in the sum of $300,000 and punitive damages for the same amount. In Count I petitioner alleged jurisdiction of the District Court under Title 28 U.S.C., Section 1343(3) and a cause of action pursuant to Title 42 U.S.C., Section 1983. In Counts II and III petitioner sought relief pursuant to both the Fifth and Fourteenth Amendments to the Constitution of the United States.

In substance petitioner alleged that respondents Fitzgerald and Curry failed to grant a permit to construct buildings. They were alleged to have done this while acting under color of law separately and in concert engaged in illegal conduct damaging the petitioner and depriving it of its rights and privileges through their wanton, willful, arbitrary and capricious refusal to process and issue building permits requested by petitioner. It alleged it filed applications for permits on January 11, 1972, and 27 days later, February 7, 1972, filed its suit to compel issuance of the permits in the Circuit Court of Cook County.

Further petitioner alleged that when respondents were ordered by the Circuit Court of Cook County to issue said

permits, respondent Curry engaged in a spurious appeal. It is alleged that this appeal was characterized by unreasonable delaying tactics in the filing of briefs and in the refusal to expedite oral argument. (Respondents had sought and been granted one thirty-day extension of time. They did not file objections to petitioner's motion to expedite oral arguments in the Illinois Appellate Court.)

The result of respondents' actions as alleged by petitioner was that it could not use its land for the purpose for which it intended. Petitioner further alleged that large sums of money were expended in payment of contracts which had been previously executed with prospective purchasers. Petitioner also claimed as losses the payment of commissions earned by sales personnel for the sale of such property as well as the loss of contemplated profits through the development of the property. Petitioner did not allege, however, that the value of its property was reduced as a result of the respondents' action. Nor did the complaint claim that the property could not be used for some purpose other than the desired use, or that petitioner received no income from the property during the time its application for a building permit was pending.

In district court, respondents' motion to dismiss was granted as to the City of Chicago and Corporation Counsel Curry. The order stated that the statute of limitations had run on the claim against the city, pursuant to Illinois Revised Statutes (1975), ch. 85, par. 8-101. The trial court also held that Curry's actions as Corporation Counsel were immune from suit, citing *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). A motion to dismiss on behalf of Joseph F. Fitzgerald was granted and the case was dismissed for failure to state a claim upon which relief may be granted.

The Court of Appeals for the Seventh Circuit affirmed, holding that neither petitioner's Fifth nor Fourteenth Amendment rights against a "taking" without just compensation, nor petitioner's Fourteenth Amendment right against deprivation of property without due process of law were violated.

REASONS FOR DENYING THE WRIT

The decisions of both the district court and the court of appeals in this case are clearly correct. Moreover, the case raises no novel question of federal law, nor is there any conflict between circuit courts of appeals.

I.

THE DECISION BELOW IS CONSISTENT IN PRINCIPLE WITH DECISIONS OF OTHER FEDERAL COURTS AS TO WHAT CONSTITUTES A TAKING OF PROPERTY.

The distinction between a taking of property and damage to property is central to this case. It is important because damage to property—that is, some injury to property less than the deprivation of all the owner's rights in the property—caused by governmental condemnation proceedings or regulation has been universally held to be noncompensable. *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962).

The result below is consistent with decisions of this court holding that absent a physical invasion of the property, no constitutional taking occurs unless the owner is deprived of all reasonable use or benefit in the property. In fact, in the recent case of *Penn Central Transportation Co. et al.* v. *City of New York, et al.,* ..... U.S. ....., No. 77-444, decided June 26, 1978, this Court was presented with a strikingly similar "taking" issue. The question presented was whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks without just compensation. The Court concluded that there was no taking, since the preservation law had not transferred control of the property to the City, but only restricted appellants' exploitation of one aspect of it. There was no denial of due process because (1) the same use of the terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the terminal itself as it currently existed. In the instant case the most that was alleged was a temporary delay in the approval of building permits for the period of time necessary to conclude the legal proceedings, certainly a lesser interference than the permanent restrictions imposed on the property in *Penn Central.* Also like the *Penn Central* case, the landowner here failed even to allege that the land was unsuited to any but the desired use or it did not or could not obtain any economic benefit from the property while the building permit application was pending.

The cases cited by petitioner, *Sanfilippo* v. *County of Santa Cruz,* 415 F.Supp. 1340 (N.D. Cal., 1976). *Donohue Const. Co.* v. *Marlyland-National Capital Park and Planning Commission,* 398 F.Supp. 21 (D. Md., 1975); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal., 1974); *Benneson* v. *United States,* 548 F. 2d 939 (U.S. Ct. Cl. 1977); *Brown* v. *Tahoe Regional Planning Agency,* 385 F. Supp. 1128 (D. Nev. 1973), indicate a proposition that is not in dispute in that where a governmental body regulates property to such an extent as to deprive the owner

of all practical uses this most certainly constitutes a taking. This line of cases cited by petitioners are not applicable to the instant case.

In the absence of governmental acquisition of title, or a *de jure* taking, this Court has held that to constitute a taking within the meaning of the Fifth Amendment, the effects of governmental action must be ". . . so complete as to deprive the owner of all or most of his interest in the subject matter." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). Such an interest is understood to be an interest in property since ". . . the Fifth Amendment concerns itself solely with the 'property', *i.e.* with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership." *United States* v. *General Motors,* at 378. Nowhere in its complaint did the petitioner allege that the respondents' action destroyed its interest in the property or reduce the property value. Without these allegations no claim under the Fifth Amendment is proper. The only harm alleged is in paragraph nine of the complaint which states that the petitioner lost sales commissions, money paid for contracts and loss of profits. These are collateral effects and not compensable. *United States* v. *General Motors, ibid.* Further the complaint did not even allege the value of the property was reduced, the *sine qua non* of a taking. Nor did the complaint allege that absent the denial of the uses it desired, there was no other reasonable alternative use.

Accordingly, the decisions of both the district court and the court of appeals in this case are consistent with the decisions of other federal courts as to what constitutes a taking of property in violation of Fifth and Fourteenth Amendment rights.

II.

THE COMPLAINT DOES NOT STATE A CLAIM FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The thrust of petitioner's Complaint has been that the respondents wrongfully refused to issue building permits for the construction of fifty-one separate buildings to which it was entitled under the provisions of the Municipal Code and that the respondents are liable for monetary damages allegedly flowing from that denial.

Courts have consistently held that a right to have a state or city law obeyed is a state, and not a federal right. Violations of state or city statutes do not infringe upon the United States Constitution. *Snowden* v. *Hughes,* 321 U.S. 1 (1944); *Dorsey* v. *N.A.A.C.P.,* 408 F.2d 1022 (5th Cir. 1969); *Sigler* v. *Lorori,* 404 F.2d 659 (8th Cir. 1968); *Chism* v. *Price,* 457 F.2d 1037, 1039 (9th Cir. 1972); *Brosten* v. *Sheeler,* 360 F.Supp. 608, 614 (N.D. Ill. 1973), affirmed without opinion 495 F.2d 1375 (7th Cir. 1974).

To support an action in federal court based upon the federal constitutional guarantee of due process, only a violation of federal due process will suffice.

> "It is well settled that the plaintiffs' alleged right to have the relevant state law strictly obeyed is not a federal right protected by the Civil Rights Act . . . or the Constitution of the United States." *Saunders* v. *Cahill,* 359 F.Supp. 79, 83 (N.D. Ill. 1973).

Petitioner's right to have a municipal ordinance obeyed is likewise not a federal right, and although the appellant has previously dismissed this basic legal tenet as a ". . . somewhat cryptic proposition . . ." its failure to present a claim arising under the Fourteenth Amendment

precludes the federal court from exercising jurisdiction over this case.

Since the complaint failed to state a claim under the Fourteenth Amendment for either an unconstitutional taking or a deprivation of property without due process of law the court below properly granted the respondents' motion to dismiss.

CONCLUSION

Petitioner has not alleged any violation of its constitutional rights and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 13, 1978